

LEGAL FORUM

The Health and Safety in Employment Act 1992 - An Overview

Peter Kiely and Stephen Langton*

Introduction

The Health and Safety in Employment Act 1992 (HSE Act or the Act) is a legislative initiative designed to address the problems posed by the previous statutory regimes. In essence this can be reduced to three objectives: a shift in financial responsibility from government to employers, a need for stricter enforcement, and a centralisation of the law.

In 1990 five people were killed every fortnight at work; 17 accidents per week were investigated by the Department of Labour; five employees each week were left with permanent disabilities and 200 employees each week were laid up with work related injuries; undoubtedly a serious concern from a social and economic perspective in that it cost the nation 300 million dollars in Accident Compensation payments. And the cost of lost production and retraining is estimated at around 1.5 billion dollars per annum - a staggering two percent of GDP.¹ Not surprisingly, the Act is designed to shift the financial commitment and responsibility from the government to the employer by imposing proactive duties reinforced by hefty liabilities and penalties.

The Act centralises the applicable laws. The plethora of legislation covering the field prior to the Act was seen as inefficient, unduly complex, and as attempting to cover too much in too great a detail. As such the "mish mash of prescriptive legislation" has been replaced.² Formerly 10 statutes contained major health and safety provisions and over 20 others had some relevance. The Minister of Labour, Hon. Bill Birch, in introducing the Bill emphasized that it would be better to combine this "mish mash" by placing all relevant regulations or codes of practice under one statute.

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1 Lamm, Felicity (1992), Persuasion or Coercion: Enforcement Strategies in Occupational Health and Safety. In Deeks, John and Perry, Nick (eds), *Controlling Interests: Business, the State and Society in New Zealand*, ed. John Deeks and Nick Perry, Auckland University Press, p.156

2 Hon. Bill Birch, HSE Bill Parliamentary debates, IRP 6404

The previous Acts were particular to their industry. Whilst their overall objectives of health and safety in the workplace were the same, they were inefficient in their enforcement. The system relied on inspectors travelling to work sites checking that safety requirements were being met. Inevitably there was a tendency to try and save costs by appointing few inspectors and giving them less resources.

There was also a widely recognised perception that the law as it stood encouraged people to view health and safety as basically a government responsibility. It was not a matter of internal management for the benefit of the company. Rather it was a case of complying with the government requirements.

Finally, the difficulty was simply one of finding the law. There were so many statutes and regulations that it was difficult to determine the extent of applicable statutory obligations.

Ten rationales were identified for passing the Act. These include:³

- a comprehensive coverage for all work situations
- clearly defined responsibilities
- promotion of excellent health and safety performance
- improved hazard identification and control methods
- involvement of employees in health and safety issues
- health and safety training and education
- dual approach of incentives and penalties
- specific hazardous situation identification
- government interventions that reduce compliance costs
- active administration of health and safety.

This radical development in the law needs to be assessed in light of the overall objective of the legislation.

The legislative scheme - what duties are imposed on the employer?

The underlying intent of the Health and Safety in Employment Act 1992 is to encourage employers to strive for the ever elusive "excellence" in management of health and safety in their place of work. The object of the Act is stated "to provide for the prevention of harm to employees at work".⁴ The Act enumerates three means by which this can be achieved:⁵

- by promoting excellence in health and safety management
- by requiring people in places of work to perform specific duties to ensure that people are not harmed as a result of work activities

3 Department of Labour *Guide to Health and Safety in Employment Act 1992*

4 Section 5

5 Ibid

- by providing for the making of regulations and approved codes of practice relating to specific hazards.

These obligations will be subject to judicial interpretation. With the recent passage of this legislation the level at which the standard of the duty will be imposed is still relatively uncertain.

Section 6 - The general duty

Section 6 of the Act is an all encompassing provision whereby the employer is under an obligation to "take all practicable steps to ensure the safety of employees while at work." In particular the employers are required to "take all practicable steps" pursuant to Section 6 to:

- provide and maintain a safe working environment⁶
- provide and maintain facilities for safety of employees at work⁷
- ensure that machinery and equipment in the place of work is designed, made, set up and maintained to be safe for employees⁸
- ensure that employees are not exposed to hazards in the course of their work, either at work or near their place of work which is under the employer's control⁹
- develop procedures for dealing with emergencies that may arise while employees are at work.¹⁰

This general duty is not limited to the employer. The obligation extends to self employed people¹¹, persons in control of work places¹² and "principals". They are also under a duty to

6 Section 6(a)

7 Section 6(b)

8 Section 6(c)

9 Section 6(d)

10 Section 6(e)

11 Section 17

12 Section 16

"take all practicable steps to ensure¹³:

- (a) no employee of a contractor or sub-contractor; and
- (b) if an individual, no contractor or sub-contractor,

is harmed while doing any work (other than residential work) that the contractor was engaged to do."

Employees themselves are obliged to take all practicable steps to ensure their own safety and the safety of those around them¹⁴.

The interpretation of "practicable steps" and the standard of that duty, albeit general, is by no means precise. It is likely that it will be interpreted as having a very high standard and will be applied on a case by case basis.

The term "practicable steps" is used throughout the legislation. It is the critical benchmark against which an employee's and employer's actions will be judged. As such it is necessary to afford it some definition. There are three useful guides by which it may be interpreted.

Firstly, Section 2 of the Act is a useful but by no means exhaustive guideline. It provides a definition of all practicable steps being those which have regard for:

- (a) the nature and severity of the harm that may be suffered if the result is not achieved; and
- (b) the current state of knowledge about the likelihood that harm of that nature and severity will be suffered if the result is not achieved; and
- (c) the current state of knowledge about harm of that nature; and
- (d) the current state of knowledge about the means available to achieve the result, and about the likely efficacy of each; and
- (e) the availability and cost of each of those means.

The employer must determine what harm may arise and take steps to minimise the likelihood of it arising. The definition also recognises that employers are not required to minimise risk at all costs. The Act acknowledges that the objective of the Act, to provide a safe working environment, must be balanced against the economic cost of doing so and what is practicable in the circumstances.

13 Section 18: The application of Section 18 depends on a definition of contractor. Section 2 provides that a contractor is one who is "engaged by any person (otherwise than as an employee) to do any work for gain or award whilst a sub-contractor is one engaged by the contractor".

14 Section 19

Secondly, the overall legislative intent and the Act's primary objective "to provide for the prevention of harm to employees at work",¹⁵ must be taken into account.

And thirdly, prosecutions dealt with by the District Court establish the relevant standards required. In *Department of Labour v De Spa Company Limited*,¹⁶ the District Court Judge considered the situation from an "in hindsight" point of view. He held that where the employer had undertaken health and safety measures following the accident the relevant hazard was adequately minimised or isolated. By identifying what procedures were, or could have been employed in the circumstances, he found that the employer had not taken all practicable steps leading to the accident. The employer was convicted and fined.

In *Mair v Regina Limited*¹⁷, a prosecution for a breach of Section 6, a chute guard had been fitted to a machine on the recommendations of the Department of Labour. Because certain processes were difficult to carry out the guard was removed and inadvertently not refitted. The company produced expert evidence to show that the machine did not pose any danger if it was operated in a well regulated environment and the employees had regard for their own safety. However, although the operators knew that reaching down to the machine rollers was dangerous and was an extremely unusual occurrence, Everitt DCJ. ruled that:

"In the context of this prosecution it is not conducive to meeting the requirements of the Act to adopt an attitude as evidenced by [the defendant witnesses] that potential hazards could only arise if someone acted irrationally and were determined on self destruction. Once a perceived hazard has been pointed out, the obligation on the employer is to take all practicable steps to eliminate such hazards."

His Honour observed the nature of the obligation as follows:

"the obligation is placed by the Act on the defendant company to take all practicable steps . . . the Act contains a new philosophy . . . it requires employers to be pro-active . . . employers are now required to be analytical and critical in providing or maintaining a safe working environment. It is not just a matter of meeting minimum standards and codes laid down by statute. It requires employers to go further and to set down their own standards commensurate with the principle object of the Act, after due analysis and criticism. This is a new duty cast upon employers."

Thus the mere vagueness of the concept "practicable steps" will not enable an employer to plead ignorance or uncertainty. A successful defence needs to point to some evidence of health and safety systems which had been put in place; whether that will amount to "Practicable Steps" is a question for the Court.

15 Section 5

16 (CRN30090213/93, Christchurch District Court, 8 October 1993, Holderness DCJ)

17 (CRN 3045004405, Dunedin District Court, 22 February 1994, Everitt DCJ)

In another case *Department of Labour v Frasers Bacon Limited*¹⁸ the Judge found that notwithstanding the employee's own contributions to the accident by breaching the company's safety policy, the company had still not taken all practicable steps as required by the Act.

Specific duties

Outside the general duties owed under the Act there are specific duties which every employer must comply with. These are well defined and there is no excuse for non-compliance.

(i) *Identification of hazards*

Employers are under a specific duty to ensure that there are effective methods in place for identifying significant hazards.¹⁹ A "significant hazard" is defined as one that:

"is an actual or potential cause or source of serious harm; or harm (being harm that is more than trivial) the severity of whose effects on any person depend (entirely or among other things) on the extent or frequency of the person's exposure to the hazard; or harm that does not actually occur, or usually is not easily detectable, until a significant time after exposure to the hazard."²⁰

(ii) *Duty to eliminate, isolate or minimise*

In the event that a significant hazard exists the employer is then under a positive duty to take all "practicable steps" to eliminate, isolate or minimise it. If this is not a realistic probability, as with many types of industrial processes, then the Act prescribes five steps²¹ which the employer must comply with. These include:

- (i) minimising the likelihood that the hazard will be a source of harm to the employee by all practicable steps
- (ii) ensuring that suitable protective clothing is provided and made available
- (iii) monitoring the employee's exposure to the hazard

18 (CRN 3012009612, Dunedin District Court, 14 February 1994, Everitt DCJ)

19 Section 7

20 Section 2

21 Section 10

- (iv) ensuring all practicable steps are taken to obtain the employee's consent to the monitoring of the health in relation to exposure to the hazard
- (v) monitoring the employee's health in relation to the exposure to the hazard with their informed consent.

(iii) *Information sharing*

An employer must ensure that every employee is fully informed as to health and safety by a medium that employees can understand. They must be kept up to date on information regarding emergency procedures, hazards that an employee may be exposed to in the course of their work and what steps are taken to minimise those hazards. The information must be accessible and easily understood by the employee. It is insufficient that management understand it or that it is merely made available.²²

There is an express obligation on the employer to take all practicable steps to ensure that employees have sufficient knowledge of their job to be able to conduct themselves safely. Employers are obliged to ensure that their employees have sufficient knowledge and experience in their mode of work so that by undertaking their activities they are not likely to be caused harm or cause harm to other people. If employees do not have the requisite knowledge and experience then the employer must ensure that they are under the supervision of someone who does and that the relevant employees are adequately trained.²³

As well, the employer is under a duty to involve all employees²⁴ in the development of health and safety procedures which are either instigated to comply with the Act or to deal with emergencies or imminent dangers. In the event that employees are subject to monitoring under the Act then the employers are under a positive obligation to inform the employees of any health and safety monitoring.²⁵ In furnishing the information to the employee or employees in general the employer must respect employees' privacy by omitting from the results any information that "identifies, or discloses anything about" any employee.²⁶

The Act also prescribes procedural requirements in the event of an accident or serious harm. The employer must maintain a register of accidents in which every accident that has harmed an employee at work or in any position in the place of work under the employer's control is recorded. In addition the place of work, the time and day of the occurrence, the nature and cause of the occurrence are to be recorded along with any investigation which has been

22 Section 12

23 Section 13

24 Section 14

25 Section 11

26 Section 11(2) and Section 11(3)

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22 Section 12

23 Section 13

24 Section 14

25 Section 11

26 Section 11(2) and Section 11(3)

carried out and the identification of any significant hazard which exists.

Where there is an accident or serious harm in the place of work the employer is obliged to "take all practicable steps to ensure that the occurrence is so investigated as to determine whether it was caused by or arose from a significant hazard."²⁷

The employer must notify the Secretary of Labour of any accident or serious harm "as soon as is possible after its occurrence" and within seven days give the Secretary written notice in the prescribed form of the circumstances of the occurrence.²⁸

The difficulty with this obligation lies in the words "as soon as is possible". In some circumstances the harm done to an employee might not be notified to the employer immediately. In that instance it is difficult to impose a literal interpretation of "as soon as is possible" when notification does not occur immediately. Similarly where the seriousness of the harm is apparently minor at first instance and its effect is not fully known for some time then notification might not be "as soon as is possible" under a literal interpretation.

Administration provisions - inspectors, departmental medical practitioners, codes of practice

Inspectors

The Act expressly stipulates how the legislation will function in practice. The job of policing the Act is given to an appointed inspector²⁹ with specified functions. They include determining whether the Act is being complied with, helping people to develop and improve the safety standards in their place of work and the health of the people working. They are also obliged to take all practicable steps to ensure compliance with the Act.³⁰ If there is an alleged breach of the Act any prosecution against an employer or otherwise is the responsibility of the inspector who has the requisite standing to bring an action.³¹

In order that the inspectors may carry out their functions, the Act enables them to enter the place of work at any reasonable time and carry out examinations, tests or enquiries. The powers of entering and inspection are limited to the place of work and they are expressly prevented from entering homes except with the consent of an occupier or pursuant to a warrant.³² In the event that an inspector conducts an investigation the privilege against

27 Section 7(2)

28 Section 25(3)

29 Section 29

30 Section 30

31 Section 54

32 Section 31

self-incrimination and incrimination of the company for whom an employee works is preserved when being subject to questioning or interrogation.³³

An inspector's power pursuant to entry and inspection is relatively wide. They must prove their identity when entering a place of work. In the absence of people being there they must leave a notice advising of the visit and the reason³⁴. They may take whatever samples are required for their monitoring of conditions and for their investigations.³⁵

Written notice of what was removed and the reasons why must be made available as soon as is reasonable after the removal. The inspector is then under an obligation to advise the employer of any intention to return or destroy the samples. Wherever practicable such items must be returned. In the event that the owner of samples requires them to be returned earlier the Court has a discretion to make that order.³⁶

The inspectors, in effect, are responsible for the administration of the Act. The legislation has contemplated the need to improve systems in existing places of work and to continually monitor them in the future. Accordingly inspectors are empowered to issue notices on the employer which either stipulate improvements which must be made, or where there is a failure to comply with the provision of the Act and there is a likelihood of serious harm to someone, then a prohibition notice may be served on the employer. As a result all work which is responsible for creating that alleged risk of harm must cease until the inspector is satisfied that the hazard has been eliminated, isolated, or minimised.³⁷

In effect these notices should ring warning bells in the employer's ears in that they are not complying with the Act. Often the notices will go further and advise what actions must be taken to comply with the law and in that sense the employer is given the opportunity to address the health and safety problems at the workplace. Non-compliance with these warnings will be grounds for an action against the employer.

Departmental medical practitioners

The Act provides for the appointment of departmental medical practitioners³⁸ and establishes their powers of entry and inspection which are not dissimilar to those of an inspector. They may require an employee to undergo medical examinations in the event that they have been exposed to a significant hazard while at work or in order to determine

33 Sections 31(5) and Section 31(6)

34 Section 32

35 Section 33

36 Section 33(2)(c)(ii)

37 Sections 39, 40, and 41

38 Section 34

whether the mode of employment in the exposure to significant hazards has a correlative effect on the employee. Notice must be given in writing and if satisfied on reasonable grounds that the employee has either failed to comply with the notice or has been exposed to a significant hazard at work, the practitioner may issue a suspension notice which the employer and the employee must comply with. Such notices will expire when the practitioner is satisfied that the person is fit and well enough to resume work.

Codes of practice

Few industrial processes are peculiar to one firm or industry. Therefore the legislation has allowed for the development and approval of a statement of preferred work practices, known as "approved codes of practice". These codes of practice are recommended ways an employer may comply with the Act and may incorporate procedures to be taken into account when deciding on what is practicable. The codes are produced by a conjoint effort between the Department of Labour and the relevant affected industry. Whilst codes of practices are not and will not be mandatory, in the event of a prosecution for a breach of the general duties under Part II of the Act, they may provide a benchmark of good practice from which the Courts will be guided. Furthermore small businesses which are unable to afford expensive in-house health and safety management have been provided for adequately in this way.

Prosecutions, offences and penalties

As the Act is a relatively new piece of legislation, coming into force on 1 April 1993, the penalties imposed on parties in breach must be the subject of continuous monitoring. The Department of Labour has demonstrated an enthusiastic willingness to enforce the Act. This is reflected in the dramatic increase in penalties in comparison to those under the previous legislation. Under the Act, individual officers, directors and advisors may be liable if subjected to prosecution by the Department of Labour. There are two principal provisions relating to offences under the Act.

Section 49

The first, and the most serious offence provision is Section 49. In contravening the Act, where a person does or does not take an action knowing that it is reasonably likely to cause death or serious harm, then that person could be fined up to \$100,000 or face up to one year imprisonment or both.

It should be emphasised that an offence under Section 49 of the Act will be successfully defended if the prosecution cannot prove that the employer intended or had knowledge of that action. To that extent two component parts of the offence must be proved:

- (a) That the action was taken (actus reus); and
- (b) That it was intended to be taken (mens rea).

To date only one case has been dealt with by the Court under Section 49.

*Westland Funeral Services Limited*³⁹ was the first prosecution to involve a Section 49 charge under the new legislation. The facts of the case involved an accident in which a worker had his finger amputated at the second joint by an unguarded circular saw. As might be expected under Section 49, the prosecution was confronted with difficulties in proving that the defendant knew such failure to take all practicable steps was reasonably likely to cause serious harm and the defendant was found not guilty.

Table One records the scheme of prosecutions up until 29 April 1994.

**Table 1: HSE ACT 1992 PROSECUTIONS
Section 49 Offences**

For breach of Section	Number of Cases	Cases dealt with
6	4	1
7	3	
8	2	
13	2	
19	1	
TOTALS	12	1

Section 50

The second offence provision is Section 50. Where a person fails to comply with the provisions or regulations of the Act, and that failure causes death or serious harm, then the person if convicted could face a fine of up to \$50,000.

Thus the first step is to determine whether the accident victim has suffered any "serious harm". Serious harm is defined in the First Schedule of the Act as being:

- "1. Any of the following conditions that amounts to or results in permanent loss of bodily function, or temporary severe loss of bodily function; respiratory disease, noise induced hearing loss, neurological disease, cancer, dermatological disease, communicable disease, musculo-skeletal disease, illness caused by exposure to infected material, decompression sickness, poisoning, vision impairment, chemical or hot metal burn of eye, penetrating wound of eye, bone fracture, laceration, crushing.
2. Amputation of body parts.

³⁹ *Safeguard Magazine*, No. 22, November 1993, p.8

3. Burns requiring referral to a specialist registered medical practitioner or specialist out-patient.
4. Loss of consciousness from lack of oxygen.
5. Loss of consciousness, or acute illness requiring treatment by registered medical practitioner, absorption, inhalation, or ingestion of any substance.
6. Any harm that causes the person harmed to be hospitalised for a period of 48 hours or more commencing within seven days of the harm's occurrence."

A person who fails to comply with the provisions of the Act or regulations could face a fine of up to \$25,000, irrespective of whether serious harm or death results.

Section 50 is a strict liability offence and may be defended successfully where the person who has allegedly breached the Act can prove total absence of fault. In this sense it is not an offence of absolute liability. It is irrelevant whether the offender intended his actions or was ignorant of the facts, only that he did the act. Nevertheless, an employer may escape liability where it can prove on the balance of probabilities that it was wholly without fault.

The majority of the prosecutions to date have been under Section 50 and are the best guide to the Courts' approach to penalties. The following two prosecutions illustrate the level of fines imposed at present.

In *Furniture Three NZ*⁴⁰ a process worker suffered amputation of two fingers and severe lacerations to another finger when his hand was trapped in part of a 15 tonne punch and forming press. As a result of the Occupation Safety and Health investigation it was shown that the area between the tool and the die was exposed to the operator. There was a guard which should have been fitted to the machine but was lying on the ground at the time. Furthermore, when the accident occurred the injured worker was operating the metal press for the first time. He had some instruction as to its use and was advised to take care as it was dangerous but there had been no practical demonstration given to him. He had not been trained in respect of the existence, purpose and function of the guard, what to do if the guard was not fitted, and to keep all his body away from the dangerous parts of the machine.

Accordingly the District Court imposed liability under Section 50 on the employer and fined it \$7,500 for failing to prevent exposure to the hazard and \$1,500 for failing to adequately train employees. The District Court Judge indicated there will be an element of doubt adapting to the new legislation but stressed that it should be expected that over time the fines will rise and that he did not want the fine in the case in point to become a precedent in a few years.

In *Engineering Plastics Limited*⁴¹ a worker was setting up a bench saw to cut pieces of

40 *Safeguard Magazine*, No. 23, January 1994

41 *Ibid*

the process of making his first cut when he stood on something on the floor causing him to slip. As a result his left hand which was holding the plastic strip slipped on the bench resulting in the amputation of the middle and index fingers just below the finger nail. The Occupation Safety and Health investigation revealed that there was no guard fitted to the machine and although the firm had been advised of it in 1987 and one had been provided it was not fitted to the saw at the time of the accident. The employer was found liable and fined \$3,000.

Sentencing principles in these cases and others have been enumerated by the High Court in the recent case of *Department of Labour v De Spa & Co Limited, Westland Funeral Services Limited and Gordon's Wool & Skins Limited*⁴². This case involved an appeal by the Department of Labour on the level of penalties imposed on the defendant companies. The High Court listed relevant, yet not exhaustive criteria, in determining the level of fines which should be imposed upon a convicted defendant. Briefly these include:

- (i) The degree of culpability.
- (ii) The degree of harm resulting. For instance, a case of serious harm as defined in the Act should be considered more serious than one not involving serious harm.
- (iii) The financial circumstances of the offender. A small impecunious employer may be treated more favourably as opposed to a large financially strong employer.
- (iv) The attitude of the offender with regard to remorse, co-operation with the authority and the willingness to take remedial action.
- (v) A plea of guilty, if entered, be relevant to the level of a fine.
- (vi) The need for deterrence, both particular and general, must be borne in mind.
- (vii) Whether the Court will exercise its positive duty in applicable cases in considering whether to award part of the fine to the victim by way of compensation under Section 28(1) of the Criminal Justice Act 1985.
- (viii) The safety record, both specific and general, of the employer will be material. The problem with this may be that by acknowledging areas where a company has improved or may be improving then it may amount to a concession of guilt in a defended hearing.
- (ix) All other relevant criteria of the particular case.

42 (AP 377/93, 12/93, 58/94, Christchurch High Court (full Court), 31 March 1994, Fraser and Tipping JJ.)

In the case of De Spa & Co. Limited the fine imposed by the Court was increased from \$6,500 to \$15,000. The Court indicated that a fine of \$20,000 could not have been challenged as being too high.

Up to March 1994 there have been 205 prosecutions lodged, of which only 65 have been dealt with. Tables Two, Three and Four provide a useful overview of the prosecutions to date under each relevant section.

Table 2: HSE ACT 1992 PROSECUTIONS AS AT 29 APRIL 1994

For breach of Section	Prosecutions lodged	Dealt with
6	86	26
7	14	1
8	4	
9	2	1
10	5	2
12	5	1
13	33	11
15	6	1
16	6	3
17	4	3
18	5	1
19	8	2
23	2	
25	16	9
26	7	3
39	2	1
TOTALS	205	65

Table Three shows that whilst the majority of prosecutions are against the employer, liability also extends to employees, self-employed and principals.

Table 3: HSE ACT PROSECUTIONS AS AT 29 APRIL 1994

Prosecutions lodged:	
Against employer	183
Against self-employed	4
Against principal	4
Against person in control	5
Against employers	9
TOTAL	205

The rigour with which the Court will enforce the Act and impose penalties is perhaps the most telling of its effect. Table Four provides an indication of the proportion of convicted defendants which are fined.

Table 4: HSE ACT CASES DEALT WITH AS AT 29 APRIL 1994

Convicted and fined	39
Convicted and discharged	3
Discharged without conviction	3
Withdrawn	20
TOTAL	65

The role of penalties under the Health and Safety in Employment Act is perhaps the very essence of its purpose. With the general objective of the legislation being to impose positive duties on employers and shift the financial burden from government to employer then penalties must provide sufficient incentive or deterrence to compel compliance. To this extent, the Act interrelates with other statutes governing health and safety in the workplace.

The Accident Rehabilitation Compensation and Insurance Act 1992 provides *inter alia* for an experience rating system for employers and also the abolition of lump sum payments to people who suffer disabilities arising out of personal injury by accident.

Under the experience rating system for Accident Compensation levies, a low rate of accidents in the workplace is reflected in the amount of the levy imposed. Arguably large corporations will not be affected by fluctuations in levies and to that extent they will be relatively ineffective in giving employers the incentive to turn their heads to health and

safety in the workplace because their levy is higher. It is at this point that the experience rating system and the punitive liability under the Health and Safety in Employment Act diverge. The former represents an incentive based "carrot" system whereas the latter can be seen as more of a "big stick".

There is conflicting opinion as to whether the experience rating system has an effect on the reduction of accident rates. The question remains whether it is designed to benefit workers by improving safety and health management or merely to benefit the employers by spreading costs more fairly. Any future reduction in work injuries will be difficult to attribute to the experience rating system alone in light of the Health and Safety in Employment Act.⁴³

The abolition of lump sum payments under the Accident Compensation reforms may be a ground for the imposition of larger penalties under the Health and Safety in Employment Act. In *Furniture Three NZ*, and *Engineering Plastics Limited* the major part of the fines imposed on the employer were awarded in the form of a lump sum to the injured employee. It may be that this is a bold indication by the Court that the fines imposed are a means of by-passing legislative reform under the Accident Rehabilitation and Compensation Insurance Act 1992.

A case which attracted some publicity⁴⁴ over this arguable "bypass" of the abolition of lump sum payments under the Accident Rehabilitation and Compensation Insurance Act 1992 was *Department of Labour v Alexandra Holdings Limited*⁴⁵. Judge Moore ordered that \$5,000 of a \$7,500 fine and \$1,000 of a \$1,500 fine be paid to the employee emphasising that the fine was not intended as "some sort of exercise in compensation".

At this point it is pertinent to observe the shift in the law from the traditional "no fault system" as contemplated in the original Woodhouse Report to the system of imposing fines as a penalty where one is at fault. This dramatic move away from pointing the finger under previous Accident Compensation legislation may well have been reinforced with the abolition of lump sum payments under new legislation. But the purpose of one piece of legislation in the form of the Accident Compensation and Insurance Act may be frustrated at the expense of vigorous enforcement of another, in the form of the Health and Safety in Employment Act.

Table Five below illustrates the general approach taken by the Courts in awarding money to injured workers, and the amount of money collected under the new regime.

43 Duncan, Grant and Nimmo, John (1993), Accident Compensation and Labour Relations: The Impact of Recent Reforms, *NZ Journal of Industrial Relations*, 18(3): 288-305.

44 *The Dominion*, 12 March 1993 cited in [1994] ELB 48

45 (CRN 3048020814, Otahuhu District Court, 12 November 1993, Moore DCJ)

**Table 5: HSE ACT PROSECUTIONS
AWARDS TO INJURED WORKERS AS AT 29 APRIL 1994**

	Number	Total
Convicted and fined cases	39	\$96,750
Cases where awards made to workers and total fines in these cases	7	\$39,500
Workers receiving awards and amount awarded	7	\$19,500

The highest single award to one worker has been \$5,000 and the lowest has been \$1,000.

Conclusion

The Health and Safety in Employment Act is another step in the recent legislative reforms of the labour market. To that extent its aims and objectives are consistent with the Employment Contracts Act 1991 and the Accident Rehabilitation and Compensation Insurance Act 1992. Whether the object of this new legislation will be met is still relatively unknown. However, the enforcement of the Act in the first 12 months by the Courts, and the level of penalties imposed to date are indications that the legislative intent will be reached at some economic cost to employers. Hopefully the cost will be matched by a reduction in workplace accidents.

Announcing

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Papers are invited from any University discipline, CRI or other public or private organisation or individual undertaking research. The only criterion is that the paper reflect the author's current or recently completed research on labour, employment or work issues in New Zealand. Proceedings will be published and all presenters will be expected to deliver their paper on disk in a prescribed format by the date of the conference.

The contribution by graduate students has been a feature in recent years and we would like to continue to encourage their participation.

These conferences are organised alternately by the Industrial Relations Centre and the Geography Department of Victoria University of Wellington. The 1994 conference is being organised by:

Dr Pat Walsh
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